IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 964

STANDARD DREDGING CORPORATION,
Petitioner,

against

L. METCALF WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent.

PETITION WITH BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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SUMMARY.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Standard Dredging Corporation, respectfully prays that a writ of certiorari issue to review the final order of the United States Circuit Court of Appeals for the Second Circuit entered on January 30, 1943 (R. 37) affirming a final order of the United States District Court for the Southern District of New York entered on May 9th, 1942 (R. 32).

OPINIONS BELOW.

The opinion of the district court is reported in 44 F. Supp. 601. The opinion of the court of appeals is reported in 132 F. (2d) 322.

Jurisdiction.

The jurisdiction of the lower courts was invoked under the provisions of Section 9 of the Fair Labor Standards Act of 1938, 29 U. S. C. 209. Jurisdiction of this Court to issue the writ sought is provided by the Act of February 13, 1925, 28 U. S. C. 347 (a). In *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357 (1942), this Court assumed jurisdiction on a state of jurisdictional facts identical to those here involved.

Designation of Parties.

The petitioner in this Court was the respondent-appellant below, and the respondent in this Court was the petitioner-respondent below. To avoid confusion, we shall refer to the petitioner here as the dredging company and to the respondent here as the administrator.

Statement of the Case.

On December 5th, 1941, the administrator made an order (R. 13) which, after reciting that there were "reasonable grounds to believe" that the dredging company had violated Sections 7, 11 and 15 of the Fair Labor Standards Act of 1938, ordered that an investigation be made pursuant to Sections 9 and 11 (a) of said Act to determine whether the dredging company or any of its officers, agents or employees had violated the Act. On the same day, viz., December 5th, 1941, the administrator signed and issued a supoena (R. 16) to the dredging company which required that it produce the following books, papers and documents:

> "(1) Any and all books and records which record the wages paid to your employees during the period from October 24, 1938, to December 1, 1941.

"(2) Any and all books, records, documents, time cards, time sheets, papers or memoranda of any kind made by you, which record the hours worked each workday and each workweek by the said employees during the period from October 24, 1938, to December 1, 1941.

"(3) Any and all contracts, agreements or memoranda of agreement to which Standard Dredging Corporation is a party for the performance by Standard Dredging Corporation between October 24, 1938, and December 1, 1941, of dredging and drill work, levee construction, filling work and excavating work."

On December 22, 1941, the attorneys for the dredging company wrote the administrator a letter (R. 18) saying that they were of the opinion that the dredging company and its employees were not subject to the Act and that the dredging company would not, therefore, comply with the subpoena until the matter was decided by the federal courts.

On February 4th, 1942, the administrator filed in the United States District Court for the Southern District of New York an articulated petition (R. 4) verified and composed in the form and style of a bill of complaint. In this petition, the administrator made allegations of fact and conclusions of law in 16 articles, and prayed for an order enforcing the subpoena aforesaid (R. 4-10).

The matter was brought before the court by an order to show cause (R. 2), and on February 27th the dredging company appeared and filed a formal answer (R. 20) which, by denial of the allegations contained in the petition, put in issue the question as to whether the dredging company or its employees were subject to the Fair Labor Standards Act of 1938.

Thereupon the district judge, without taking any evidence or holding any hearing on the issues so raised by the pleadings, made an order enforcing the subpoena (R. 32). He filed an opinion (R. 26) in which, briefly stated, he held that the inquisitorial powers of the administrator were not limited in application to persons or corporations subject to the Act and that the administrator was entitled to have his subpoena enforced as a matter of course, automatically. In this opinion, the district judge admitted that his decision was contrary to the decision of the Circuit Court of Appeals for the Sixth Circuit in *General Tobacco & Grocery Co.* v. *Fleming,* 125 F. (2d) 596 (6th C. C. A., 1942), and he admitted that there was no reported authority to support his view (R. 29, 30).

Appeal was duly taken to the Circuit Court of Appeals for the Second Circuit (R. 34), and on January 14th, 1943, the court of appeals filed a *per curiam* opinion reading (R. 37):

> "Order affirmed on authority of *Perkins* v. *Endicott-Johnson,* 317 U. S. 501."

It is the order of the court of appeals entered on this *per curiam* opinion (R. 37) which the dredging company seeks to review in this Court by writ of certiorari.

Question Involved.

The question involved is whether, when the administrator seeks court aid in enforcing his subpoena pursuant to Section 9 of the Fair Labor Standards Act of 1938 the district court should grant such enforcement as a matter of course and automatically, merely because the administrator asks it, or whether the district court should exercise its

judicial function by inquiring into the circumstances and making a determination as to whether the subpoena seeks proper information or, on the contrary, invades the citizen's constitutional or other rights to freedom from unreasonable searches and seizures.

This question naturally resolves itself into the two following inquiries:

(a) As a matter of interpreting the statute, was it the intention of Congress that the court should be a mere mechanical device to enforce the administrator's will, or was it the intention, in requiring the administrator to resort to court, that the court should exercise its judicial discretion to protect the citizen against unconstitutional or illegal searches and seizures?

(b) If it was the intention of the statute that the court should be a mere mechanical device, thus in effect making the administrator the sole judge of the propriety of his subpoena, does the Constitution permit Congress to vest in the administrator an unrestrained inquisitorial power over the citizen?

Reasons for Granting the Writ.

(1) The decision of the Circuit Court of Appeals for the Second Circuit in the case at bar is in direct conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. (2d) 596 (6th C. C. A., 1942). On its facts, the *General Tobacco* case is exactly parallel to the case at bar and the result is exactly opposite. The *General Tobacco* case has not been disapproved or over-ruled by this Court.

(2) The decision of the Circuit Court of Appeals for the Second Circuit in the case at bar is in direct conflict with the decision of the United States District Court for the District of New Jersey in *Walling* v. *News Printing Co.*, handed down April 3, 1943, and printed herein as Appendix A. The New Jersey court does not agree with the Second Circuit that the question is controlled by the *Endicott Johnson* case.

(3) The decision of the Circuit Court of Appeals for the Second Circuit in the case at bar is in direct conflict with the rationale of the decision of the Circuit Court of Appeals for the Sixth Circuit in *Goodyear Tire & Rubber Co.* v. *N. L. R. B.*, 122 F. (2d) 450 (6th C. C. A., 1941), and with the decision of the Circuit Court of Appeals for the Tenth Circuit in *Cudahy Packing Co.* v. *N. L. R. B.*, 117 F. (2d) 692 (10th C. C. A., 1941). These cases decided a substantially identical question arising under the National Labor Relations Act and held that the court should exercise a supervisory power over the board's subpoenas. They have not been overruled or disapproved by this Court.

(4) In deciding the case at bar on the authority of *Perkins* v. *Endicott Johnson Corp.*, 317 U. S. 501 (Jan. 11, 1943), the court of appeals has apparently misconceived the effect of the decision of this Court. The *Endicott Johnson* case, as decided by the Supreme Court, is clearly distinguishable from the case at bar.

(5) The question involved is one of great public importance and there is pressing need for final determination of the matter by the Supreme Court. We need not labor this point; the magnitude of the problem is strikingly shown by the facts given in the dissenting opinion of Mr. Justice

Douglas in *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357, 367 (1942).

Respectfully submitted,

STANDARD DREDGING CORPORATION, Petitioner.

By ROGER SIDDALL,
A. V. CHERBONNIER,
ROBERT A. LILLY,
Counsel for Petitioner.

New York, N. Y.
April 26, 1943.

I certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

ROGER SIDDALL.

New York, N. Y.
April 26, 1943.